Supreme Court, U.S.
FILED
JUL 6 1994
OFFICE OF THE CLERK

No. 93-2009

In The

Supreme Court of the United States

October Term, 1994

LEADERSHIP SOFTWARE, INC.,

Petitioner,

vs.

KEPNER-TREGOE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PAUL J. HAYES
Counsel of Record
DEAN G. BOSTOCK
WEINGARTEN, SCHURGIN,
GAGNEBIN & HAYES
Attorneys for Respondent
Ten Post Office Square
Boston, Massachusetts 02109
(617) 542-2290

5359
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

14 pp

LIST OF PARTIES

The United States Fidelity & Guaranty Corporation ("USF&G") is the parent company of Respondent, Kepner-Tregoe, Inc.

TABLE OF CONTENTS

	Page
List of Parties	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Summary of Argument	2
Reasons for Denying the Writ	3
I. The Court of Appeals properly determined that K-T's material is protected by copyright.	3
II. The Court of Appeals correctly determined that LSI's material is substantially similar to K-T's materials.	5
III. There is no conflict between the circuits.	6
IV. The Court of Appeals did not find that abbreviations alone are protected by copyright.	7
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282 (1991)	4

Contents

Page

Plains Cotton Co-op. Ass'n v. Goodpasture Computer Services, Inc., 807 F.2d 1256 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S. Ct. 80, 98 L. Ed. 2d 42 (1987) ... 2, 5

Other Authorities Cited:

M. Nimmer, *3 Nimmer on Copyright*, § 12.11[D] 5

M. Nimmer, *3 Nimmer on Copyright*, § 13.01[B] 5

APPENDIX

Appendix A — Letter from ABA Dated June 6, 1994 .... 1a

STATEMENT OF THE CASE

Respondent, Kepner-Tregoe, Inc. ("K-T"), is a Maryland corporation with its principal place of business in Princeton, New Jersey (C-1). K-T is in the business of conducting management training seminars (C-2). Occasionally, K-T licenses materials written by others for use in conducting its training seminars. In 1972, K-T entered into an exclusive licensing agreement with Professor Victor Vroom and Professor Philip Yetton, pursuant to which K-T acquired an exclusive international license to copyrighted materials entitled *Leadership and Decision-Making Cases and Manuals for Use in Leadership Training* (A-4). Pursuant to the provisions of its exclusive license, K-T paid royalties to Professors Vroom and Yetton in the amount of $452,000 (A-4; C-2). In addition, K-T ultimately bought out the license for a further, one-time, payment of $100,000 (A-4). The materials exclusively licensed by K-T from Professors Vroom and Yetton include a series of definitions and questions. The definitions and a number of the questions are set forth in the district court's opinion (C-5-C-9).

Petitioner, Leadership Software, Inc. ("LSI"), was incorporated in 1987 by Professor Vroom and another, Professor Jago, for the purpose of marketing the materials that were found to infringe in this case (C-3). Those materials are entitled *Managing Participation in Organizations* ("MPO"). The MPO material uses five definitions and a number of questions in its text. The district court set forth K-T's licensed materials and the MPO material, in a side-by-side comparison, in its Findings of Fact and Conclusions of Law (C-5-C-9). The district court rejected LSI's argument that K-T's material is not protected by copyright. The district court found that the accused MPO material was substantially similar to, and infringed, K-T's material. The Court of Appeals affirmed, observing that the definitions and questions in the MPO material are "virtually identical" to the definitions and questions in K-T's

licensed materials (A-7). Thus, the proper test for copyright infringement was followed below. *See, e.g., Plains Cotton Co-op. Ass'n v. Goodpasture Computer Services, Inc.*, 807 F.2d 1256, 1260 (5th Cir.), *cert. denied*, 484 U.S. 821, 108 S. Ct. 80, 98 L. Ed. 2d 42 (1987) (copyright infringement proved by a showing that defendant had access to the copyrighted works, and that there is a substantial similarity between the infringed and the infringing works).[1]

The district court awarded K-T damages in the amount of $46,000 with interest, attorneys' fees and costs (B-1-B-3; C-19-C-23). No portion of the award has been paid by LSI, and LSI has not posted a bond. Thus, K-T has not received any compensation for LSI's infringement. Moreover, given the absence of any such payment or bond, K-T can only speculate as to whether it will ever receive any payment from LSI.

SUMMARY OF ARGUMENT

LSI argues that the Court of Appeals erred in finding that K-T's materials are protected by copyright. According to LSI, K-T's management training materials contain subject matter akin to a law of nature that is not protected by copyright. The Court of Appeals accurately observed that LSI's argument is "absurd" (A-17). The court noted that LSI had marked its own infringing MPO material as protected by copyright. After determining that K-T's materials are protected by copyright, the Court of Appeals applied the correct "substantial similarity" test for infringement. The court found *verbatim* copying by LSI (A-18) and that the accused LSI material was "a wholesale plagiarism" of K-T's material (A-20). Given the foregoing, the petition should be denied.

---

1. The Court of Appeals found that K-T had proved access to K-T's materials by LSI and that issue is not raised in the petition.

Not leaving any stone unturned in its quest for certiorari review, LSI also attempts to construct a conflict between the circuits regarding the scope of copyright protection. However, LSI identifies no actual conflict. Moreover, LSI would have been found to have infringed under all of the authorities it relies upon in contending that there is a conflict. Thus, this is not the case in which any review of the authorities is necessary.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY DETERMINED THAT K-T'S MATERIAL IS PROTECTED BY COPYRIGHT.

LSI's petition argues that the Court of Appeals erred in finding that K-T's material is protected by copyright.[2] It is LSI's position that K-T's written materials contain only ideas that cannot be protected by copyright. LSI's assertions do not warrant certiorari review as the Court of Appeals applied the proper copyright analysis and correctly rejected LSI's argument. LSI's disagreement with the Court of Appeals' decision does not provide a sound basis for review.

LSI argued in the Court of Appeals that, once the unprotectable elements are filtered out of K-T's material, no protectable expression remains whatsoever (A-17). The Court of Appeals found LSI's argument to be "absurd" (A-17). The Court of Appeals clearly recognized the distinction between unprotectable ideas and protectable expression. The court stated as follows:

---

2. *See* Petition, p. 21 (the protectability issue in this case is whether the "heart and soul elements" of K-T's material constitute unprotectable ideas or protectable expression).

> The main purpose or function of K-T's Licensed Materials is to teach managers how to analyze their own decision-making, and how to make the best decision in each decision-making context. Clearly this basic idea of a management training program is unprotectable. [footnote citation omitted] Likewise unprotectable is the more specific idea of training managers by asking them a series of questions about their decision-making landscape, and then — based on their answers — suggesting a preferred decision-making process. At the other end of the abstraction spectrum, the specific words, phrases, and sentences used to formulate the questions and processes clearly constitute protected expression. [footnote citation omitted]

(A-1-A-22).

Thus, the Court of Appeals applied the correct test in finding that K-T's registered material deserves copyright protection. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 350, 111 S. Ct. 1282 (1991), cited by the Court of Appeals (A-9).

The Court of Appeals also rejected LSI's assertion that K-T's material is not copyrightable because it is akin to a law of nature. The court found that description to be a "self-aggrandizing characterization of the V[room]-Y[etton] Model." (A-27). The Court of Appeals found telling that, although LSI argued that the K-T material is not protectable by copyright, such argument was directly contrary to the prior actions of LSI and its principals. The court noted that LSI had placed numerous copyright infringement warnings on its own infringing MPO material "reflecting their

belief that such text is copyrightable." (A-9). In addition, as the Court of Appeals observed, Professor Vroom, one of the original authors of the material licensed to K-T, applied to register those materials in the Copyright Office, "evidently reflecting his belief that those materials were the proper subject of copyright protection." (A-10). In view of the foregoing, LSI's argument was properly rejected.[3]

II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT LSI'S MATERIAL IS SUBSTANTIALLY SIMILAR TO K-T'S MATERIALS.

After identifying the unprotectable element of K-T's materials, the Court of Appeals then properly proceeded to determine whether the district court had erred in finding the accused MPO material substantially similar to K-T's materials. *See* M. Nimmer, 3 *Nimmer on Copyright*, §§ 12.11[D], 13.01[B]; *Plains Cotton Co-op. Ass'n*, 807 F.2d at 1260. On this issue, the Court of Appeals stated that the "MPO program copied those [K-T's] words, phrases, and sentences *verbatim*" (A-18). The Court of Appeals characterized the infringing MPO material as "a wholesale plagiarism of the definitions and processes that were licensed to K-T." (A-20). With respect to the accused revised MPO material, the Court of Appeals found the revision to be "just a *post factum* rearrangement of the original MPO program." (A-20).

---

3. The Court of Appeals also observed that "[t]here are countless ways of expressing the content of each paragraph, [footnote omitted] so there was no need for the MPO screen text to copy exactly the language of K-T's materials." (A-18). Accordingly, LSI has not been deprived of material that can only be expressed in one way. The court also held that only materials that are substantialy similar to the materials exclusively licensed to K-T will infringe (A-47).

Given such findings of *verbatim* copying and plagiarism, the Court of Appeals committed no error in affirming the district court's finding of infringement.[4]

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

In furtherance of its effort to obtain certiorari review, LSI distorts the decision of the Court of Appeals below and then asserts that the (distorted) decision is in conflict with decisions from other circuits. For example, on page 29 of its petition, LSI argues that, had the Court of Appeals made an "abstractions analysis", the court would have found K-T's material to be protected by copyright. LSI fails to grasp that this was a vanilla copyright case that did not require a complex analysis of the subject matter to determine whether copyright protection applied.

That notwithstanding, the court did apply an abstraction test:

> At the other end of the abstraction spectrum, the specific words, phrases, and sentences used to formulate the questions and processes clearly constitute protected expression. [footnote citation omitted] But the intermediate levels of abstraction, consisting of such factors as the structure, sequence, and organization of a copyrighted work, are more problematic: courts' judgments about the protectability *vel non* of such elements are inevitably *ad hoc* and fact specific. [footnote

---

4. Prior to filing its petition, LSI requested the Intellectual Property Law Section of the ABA to support LSI's petition. In what was characterized as "a rare display of unanimity", the ABA rejected LSI's request (Respondent's Appendix, A-1).

> citation omitted] In this case, we conclude that the modified MPO program copied substantial protectable elements of K-T's Licensed Material and thus infringed K-T's copyright.

(A-22-A-23).

This demonstrates that the Court of Appeals applied an abstraction test, the test that LSI argues would have resulted in a different finding had it been applied, and found K-T's materials protected.

Also contrary to LSI's argument is, as previously stated, the fact that LSI marked its own materials as being protected by copyright. It is incredible that LSI continues to assert that K-T's materials are not protected by copyright when LSI marked its own materials, found to have been plagiarized wholesale from K-T's, with numerous copyright protection warnings.

IV.

THE COURT OF APPEALS DID NOT FIND THAT ABBREVIATIONS ALONE ARE PROTECTED BY COPYRIGHT.

In part C, pages 40-43, of its petition, LSI argues that copyright protection was improperly extended to letter designations. In an attempt to create legal error where none exists, LSI misstates the finding of the Court of Appeals. According to LSI, the Court of Appeals found that "the abbreviation of the core processes of the Vroom-Yetton theory are protectable by copyright." LSI Petition, p. 41. The Court of Appeals made no such finding. The court stated that "LSI's copying of these features — and other related features — is thus technically infringing." (A-33). Thus the Court of Appeals did not find that copying such

designations alone, without the accompanying text, would infringe.

CONCLUSION

For the reasons set forth above, no error was committed by the Court of Appeals and its decision is fully in accordance with this Court's prior decisions. Accordingly, K-T submits that the petition should be denied.

Dated: June 28, 1994

Respectfully submitted,

PAUL J. HAYES
Counsel of Record
DEAN G. BOSTOCK
WEINGARTEN, SCHURGIN,
GAGNEBIN & HAYES
Attorneys for Respondent
Ten Post Office Square
Boston, MA 02109
(617) 542-2290

APPENDIX A — LETTER FROM ABA DATED JUNE 6, 1994

LAW OFFICES

KNOBBE, MARTENS, OLSON & BEAR
A Partnership Including Professional Corporations

PATENT, TRADEMARK AND COPYRIGHT CAUSES

620 Newport Center Drive
Sixteenth Floor
Newport Beach, California 92440-6016
(714) 760-0404

TELEX 165615 KNOBBE NPQW
FAX (714) 760-9502

June 6, 1994

MEMBERS OF THE AMERICAN BAR ASSOCIATION
Section of Intellectual Property Law
Committee No. 605 (Amicus Briefs)

Re: Possible Amicus Brief
ABA/IPL Section Amicus Brief Committee
Kepner-Tregoe, Inc. v. Leadership Software, Inc.

Dear Committee Member:

I am enclosing a copy of the ballot census for possible amicus participation in *Kepner-Tregoe, Inc. v. Leadership Software, Inc.* As you can see from the Ballot, in a rare display of unanimity, the committee has voted not to recommend the filing of an amicus brief by the American Bar Association.

I have enjoyed working with you on this Committee over the

last two years. I know you will provide the same high level of support to my successor, Laurence Pretty. In the meantime, please call me if you have any questions.

Very truly yours,

s/ BCR
William C. Rooklidge

Enclosure

cc: Section Officers (w/ encl.)
Julius J. Jancin, Esq. (w/ encl.)
Michele A. Bridges (w/ encl.)
Al Harrison, Esq. (w/o encl.)
Dean G. Bostock, Esq. (w/o encl.)